No. 15832

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

vs.

THE ENGLANDER COMPANY, INC., AND INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, WAREHOUSEMEN'S LOCAL UNION No. 117, AFL-CIO, *Respondents.*

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD AND PETITION FOR REVIEW BY RESPONDENT THE ENGLANDER COMPANY, INC.

BRIEF FOR RESPONDENT, THE ENGLANDER CO., INC.

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COUNTER-STATEMENT OF THE CASE

The Complaint

The Complaint (R. 3-8), alleges against respondent e Englander Company, Inc., as follows:

IV. That it acquired its Seattle plant shortly before nuary 16, 1956, but did not acquire its normal com- ement of employees until on or about February 15, 56.

V. That on or about January 16, 1956, Englander tered into a collective bargaining agreement with spondent union, recognizing the union as exclusive

bargaining agent for all production and maintenance employees, and establishing a union security clause reading as follows:

> "all employees employed by the Employer in the unit which is the subject of this Agreement shall become and remain members of the Union not later than the thirty-first (31st) day following the beginning of their employment."

VI. That starting on or about January 11, 1956, Englander, through its Pacific Coast manager, John Sparrowk, and his subordinates, (1) informed applicants for employment that it had a "national agreement" with respondent union which required all persons selected for hire to become members of a union affiliated with that organization or to pledge allegiance to or support of such union as a condition of hire, and (2) instructed each applicant for employment to go to the offices of respondent union to comply with such conditions precedent to hire which that union imposed.

VII. That from about January 16, 1956, Englander assisted respondent union in arranging occasions when respondent union informed applicants for employment that allegiance to, support of, and membership in respondent union were required as a condition precedent to employment.

The Complaint was issued April 25, 1956 (R. 8). The hearing commenced May 22, 1956 (R. 112). At the commencement of the hearing the general counsel orally moved for and was granted, over objection as being untimely, a trial amendment adding to Paragraph VI the allegation that on February 23, 1956, the plant superintendent, William Moore, offered employment to

ne Robert A. McDonald, but conditioned the offer on McDonald's agreement to join respondent union; that McDonald did not agree to such condition and Englander refused to hire him (R. 113-115).

On the basis of the conduct thus alleged, Englander s charged with having rendered unlawful assistance o respondent union in violation of Sec. 8(a)(2) of the Act, having unlawfully discriminated in regard to hire f employees in violation of Sec. 8(a)(3), and having nlawfully interfered with, restrained and coerced its mployees and prospective employees in violation of Sec. 8(a)(1).

3. Statement of Respondent Englander's Contentions

Respondent admits that it entered into a collective argaining agreement with respondent union, but denies that it did so on or about January 16, 1956, or at ny time prior to February 15, 1956. The Board failed o make a finding as to when the Agreement was exeuted, but did find simply that it was on a number of lates "prior to February 14, 1956," which was before representative number of employees had been emloyed (R. 88). This respondent contends that such inding is without any evidentiary support.

With regard to the allegations in Paragraph VI(1), o the effect that Sparrowk and his subordinates informed applicants for employment that the company ad a "master agreement" and that applicants for mployment had to become members of respondent nion, the Board specifically found that such allegaions, insofar as Sparrowk himself was concerned, were ot supported by the evidence (R. 40-43). The Board

did find that statements of similar import were made by two of Sparrowk's subordinates to employment applicants (R. 50-52). Respondent contends that those adverse findings are not supported by substantial evidence on the record as a whole; that the two asserted instances were isolated and casual, and that one of the instances was *after* the collective bargaining agreement between this respondent and respondent union was admittedly executed.

With regard to the allegations in Paragraph VI(2), to the effect that this respondent instructed each applicant to go to the offices of respondent union and comply with such conditions precedent to hire which that union might impose, it may be stated that the Board did not find that such instructions had been given.

With regard to the allegations in Paragraph VII, that this respondent assisted respondent union in arranging occasions when the union informed job applicants that membership in that union was a condition precedent to employment, the Board likewise made no finding.

The Board did find that the allegations concerning McDonald were supported by the evidence (R. 50-52). Respondent maintains that such evidence is fragmentary and not substantial and will not support a conclusion that respondent committed a violation of the law.

Respondent does not request this court to weigh conflicting evidence but simply to hold that the Board's findings, insofar as they are adverse to this respondent, are not supported by substantial evidence nor infer-

ences which may reasonably be drawn therefrom. Respondent accordingly asks that enforcement of the Board's order be denied and that the order be reversed and set aside.

C. The Principal Participants

It perhaps would be of some assistance to this court to have a list of the principal participants in this controversy. They are as follows:

CRAFTMASTER, INC. is a firm which up to January 10, 1956, was engaged in the manufacture of furniture and bedding at its plant in Seattle (R. 15, 116, 287-288).

JOSEPH DILLON is a representative of the Western Conference of Teamsters (R. 127).

THE ENGLANDER COMPANY, INC., is a firm which is engaged in the manufacture of upholstered furniture and bedding in a number of states and up to January, 1956, had plants on the West Coast at Los Angeles and at Oakland (R. 12-14).

WILLIAM F. EVANS is the Executive Secretary of the Washington-Oregon District Council of Furniture Workers (R. 179).

THE FURNITURE WORKERS UNION, LOCAL 3197, is a labor organization affiliated with the Washington-Oregon District Council of Furniture Workers and with the Brotherhood of Carpenters, and which represented certain Craftmaster employees consisting of the mill-room workers, the carloaders and unloaders, the lumber handlers, and those working on the shipping and receiving floor and in the boiler room (R. 177-180).

AL GORD is the President of Local 6 of the Upholster-

ers Union but at the time in question was in charge of the affairs of Local 5 (R. 189, 201, 356).

Red Henry was the shipping and receiving foreman for Craftmaster, and later for Englander (R. 131, 317).

Ed Hunt was the factory manager for Craftmaster, was later in charge of the Englander office force, and after that became factory manager for Englander (R. 130, 131, 302, 316, 322).

Carl Kissick is the business representative and financial secretary of the Furniture Workers Union, Local 3197 (R. 155, 182, 189, 270).

William J. Moore was the foreman of the upholstery and millroom departments for Craftmaster and also later for Englander, and in May, 1956, became the Englander plant superintendent (R. 131, 335).

Chester Pink is Englander's Vice-President in charge of manufacturing, with offices in Chicago, and Sparrowk's immediate superior (R. 303).

Ralph Royer is the business agent of the Upholsterers Union, Local No. 5 (R. 189, 197).

John Sparrowk was at the time in question Englander's general manager of the western division, having his residence and headquarters at Oakland, and having supervision over the Los Angeles and Oakland plants, and later the Seattle plant. At the time of hearing his title had been changed to vice-president of the western region (R. 116, 285-287).

John W. Truman is an international representative of the Furniture Workers Union and assigned to Local 3197 of that union (R. 150, 151, 189).

Upholsterers Union, Local 5, affiliated with the Upholsterers International Union of North America, is a labor organization which represented Craftmaster employees consisting of the sewers, the upholsterers, and those in the mattress room (R. 197, 198).

The Warehousemen's Union, Local 117, is a labor organization affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which local entered into a collective bargaining agreement with Englander as the exclusive bargaining agent for all production and maintenance employees, excluding certain categories not pertinent here. One of the Teamster locals (unidentified as to its number) represented the truck drivers formerly employed by Craftmaster (R. 117-118, 156, 323, 361).

W. L. Williams is the Secretary-Treasurer of Warehousemen's Union, Local No. 117 (R. 160).

D. The Facts

Prior to January, 1956, the Englander Company did not maintain a plant in Seattle. With the view to building a plant, John Sparrowk visited Seattle late in 1955, and there contacted a person with reference to acquiring some land, visited an architect, and received some quotations from a building contractor (R. 286-287). In December of 1955, Sparrowk learned of the possibility of acquiring the old plant of Craftmaster, Inc., and in that month came to Seattle to make a preliminary inspection of the premises. Negotiations for the acquisition of the Craftmaster plant continued until January 16, 1956, and were not concluded until the afternoon of

that date, with the signing of the lease and other documents. Englander purchased a portion of the Craftmaster inventory and equipment and entered into a lease with the owner of the premises, but did not assume any of Craftmaster's contractual obligations. The general counsel concedes that this is not a "successorship" situation (R. 116, 117, 123, 135, 286-289).

In the meantime, on January 10, 1956, Craftmaster had terminated the employment of its production force (R. 119). Up to that time there had been employed by Craftmaster approximately 35 members of the Furniture Workers Union, Local 3197, and approximately 71 members of the Upholsterers Union, Local 5 (R. 157, 178, 180, 192, 197, 206). There were also some truck drivers who were members of the Teamsters Union (R. 156, 323).

On January 11, 1956, five days prior to Englander's acquisition of the leasehold, the Furniture Workers Union sent a letter to Englander "To acquaint them with the fact that we had a labor agreement with the Craftmaster Company which contained a successor and assignee clause" (R. 193), and asking for a meeting to discuss the Union's position. That Union waited "a reasonable amount of time" until the following day, January 12, when its representatives conferred in Seattle and decided to establish a picket line, and its pickets appeared on January 13th (R. 181-183). Pickets of the Upholsterers Union appeared a day or two before. The picketing was a joint effort of both the Furniture Workers and Upholsterers Unions. At least in the early stages, the union officials did not know

whether they were picketing Craftmaster or Englander. In reality, they just picketed the building. The pickets were called off on or about February 13, and Englander commenced production on a substantial scale, on February 14th (R. 30, 120, 130, 132, 173, 175, 183, 196, 199, 207, 208, 296).

Englander had previously entered into collective bargaining agreements with locals of the Teamsters Union covering its plants in Oakland and Los Angeles (R. 125, 139, 140). In November, 1955, Sparrowk was told by Joseph Dillon, a representative of the Western Conference of Teamsters, at a time when Sparrowk was investigating a possible plant site in Seattle, that "we expect to have that plant on the same basis that we have your other plants" (R. 126-127). On January 9, 1956, Sparrowk met Dillon in Seattle and was then introduced to Mr. W. L. Williams, Secretary-Treasurer of Local 117 of the Warehousemens Union. Sparrowk's testimony as to his discussion with Dillon is as follows:

> "He introduced me to a Mr. Williams and indicated that inasmuch as they had contracts with us elsewhere and we had been doing business in Seattle and warehousing and it was handled by the Teamsters that they expected to have the representation in whatever undertaking we elected to do here." (R. 292)

As above stated, Craftmaster terminated its production force on January 10, 1956. At that time the plant foreman, William J. Moore, was still on the Craftmaster payroll, and he did not become employed by Englander until January 23 (R. 316, 335). Starting on January 11, the former Craftmaster employees returned

to the plant for the purpose of trying to ascertain what their prospects were concerning re-employment. Some of the former employees had telephoned Moore, some had been telephoned by him, some had been called to the plant by their own union, and some simply showed up at the plant without any prior contact (R. 337-339, 351). Sparrowk, of course, had been informed that there were three unions involved in the representation problem, being the Upholsterers, Furniture Workers, and Teamsters (R. 290, 291). On the morning of January 11, one of the former employees of Craftmaster told Sparrowk that there were some people assembled who would like to know if they were going to have a job. Sparrowk went to a little office on the second floor upholstery department and there visited with the people, who came into the office one or two at a time. Sparrowk explained to them that Englander would probably be in the business of manufacturing items comparable to what Craftmaster had been manufacturing, and that Englander had been told by the Teamsters Union it would expect to be recognized in the Seattle plant since it had contracts with Englander in other plants (R. 293-4). By reason of the demand or request for recognition by the Teamsters, Sparrowk suggested that the job applicants see Mr. Williams of Local 117 to find out "what they had to offer" (R. 294). After Sparrowk had talked to a few of the applicants he was asked where Williams' office was. Sparrowk sent for a telephone book to ascertain the address (R. 295). In at least one case Sparrowk wrote Williams' address on a slip of paper (GC Ex. 11, 370), but this was furnished at the request of the job applicant himself (R. 246).

On the morning of January 16, 1956, from 75 to 80 people were gathered in a group inside the plant. Sparrowk addressed this group as follows (R. 133-135):

"Q. Very well. Now will you tell us, please, what you did tell the employees when you addressed this group of 80?

A. I told them that we were told by the Warehousemen's union that they would have this plant inasmuch as they have Englander factories elsewhere in the country and that evidence outside tells us that there is disagreement with that; that as far as I was personally concerned I did not want us, that is, the Englander Company, to have any problems with any union, whether it was the Teamsters, the Furniture, or Upholsterers Union. I would like to tell you to come to work because I know you have been off of work a great bit since Thanksgiving but that is something I cannot tell you, as it has to resolve itself, and we are not going to start out with problems with any union. A lot of people came to me individually and said I could do so and so and so; I indicated to them my feeling, that unfortunately they were in a bind. They wanted to come to work and we wanted to start this operation, but we had this problem, that until it was resolved I didn't know what I could do.

Q. Did you not disclose to the assembled employees that you had heard of this agreement being made in the East?

A. I heard that—I had had rumors of all kinds of things taking place, but I did not specifically indicate, to my recollection, that somebody said go ahead and do something. I wasn't satisfied enough to open the plant, let's put it that way.

TRIAL EXAMINER: Satisfied with what?

THE WITNESS: With the fact that anybody had the membership sufficient that I could open the plant and recognize them as being a representative of the employees.

TRIAL EXAMINER: Did you say anything about that to the people wo were assembled there?

THE WITNESS: I indicated to them—

TRIAL EXAMINER: Tell us what you said, please.

THE WITNESS: I said to them that we are told by three different unions that they are to have representation in this plant. We are told by one that arrangement has been made with an International of another that they could or should have jurisdiction here. Frankly, I am not convinced that they know what they are talking about. That was my statement to them.

Q. (By MR. BOYD): At the conclusion of that meeting what action did you take to inform them of what to do or what they might expect?

A. Well, my closing statement, frankly, was one that was sort of an afterthought, after I got ready to go back in the office—I had worked my way towards the door—was to the effect that this is rather strange, anyway, because actually we haven't bought anything yet, that I have an appointment to go with some other people to the bank to acquire something, so we might be in business; if that didn't work out, why, all the problems we were anticipating weren't going to be in existence . . .

Q. When did you sign the papers?

A. We signed it on the 16th.

Q. How long after that meeting?

A. I think our appointment was 1:00 o'clock."

One witness described this group at the meeting of

January 16 as comprising approximately 90% of the former Craftmaster employees (R. 348). Another witness (Testerman) testified that Sparrowk told the group that this "master agreement" (referred to in the Complaint as a "national agreement") with the Teamsters, would cover the Seattle plant too (R. 223, 224). Testerman, as well as two other witnesses (Granger and Bale) likewise testified that on January 11 they had been told by Sparrowk that clearance by or membership in Local 117 was a condition of employment (R. 221, 212, 214, 245). The Board, however, specifically found (R. 40-43) that such testimony was not credible and that Sparrowk's actual statement to the employees on January 16 was simply that Englander had been told by the Warehousemens Union it would have the Seattle plant inasmuch as the Teamsters had Englander factories elsewhere in the country. There is no finding by the Board that Sparrowk told any employee that clearance by or membership in the Warehousemens Union was a condition of employment, or that Englander was bound to that union under some "master agreement."

On February 6, 1956, Truman and Kissick (representatives of the Furniture Workers) met with Williams at Local 117's office. Williams informed them that some working agreement had been reached between the Upholsterers International and the Teamsters International Unions, under which the upholsterers would retain their membership rights in Local 5, but would become members of the Teamsters. Williams offered to let the Furniture Workers Union retain its jurisdiction in the millroom and then survey the plant for the

purpose of ascertaining jurisdiction over the remaining jobs as between the Warehousemens Union and the Furniture Workers Union. Truman replied that he had thus far not been notified of any such agreement between the Internationals and that until such time as the Warehousemen and Upholsterers had settled their differences and he had been so notified by the Upholsterers, there was very little to talk about (R. 160, 161, 277).

Ralph Royer, business agent of Upholsterers Local 5, called a special membership meeting on February 13. This was attended by Al Gord, and Williams was also invited to attend (R. 201). Local 5 had received a telegram from the President of the Upholsterers International Union. As a result of the telegram the membership was instructed by Gord to go to work under the "Teamsters' agreement," but still remain members of Local 5. The "pact" between the two Internationals had apparently been in existence for some time, and it had been Royer's impression that the jurisdictional controversy would be settled at the International level (R. 190, 201, 205). Previously, Williams had addressed the Upholsterers at this meeting and informed them of the Teamster insurance and pension plans and that the Teamsters had contracts with Englander in California (R. 204). The Upholsterers voted to send its members to work under the "Teamsters' agreement" (R. 205). Later that afternoon the upholsterers met at the Teamster Hall, at which time Williams read to them from a form of the contract that the Teamsters had up and down the Coast, and in other plants. Pamphlets and booklets explaining the benefits of the Health & Welfare and Pension Plans were distributed (R. 205, 206,

355). At both the earlier and later meetings 65 out of the former 71 Craftmaster employees in the Upholsterer category were in attendance. Applications for membership in the Teamsters were then taken. Upholsterers' union pickets withdrew around that time (R. 206-8). One witness described the termination of the picketing as follows (R. 355):

> "Q. In the meantime had there been pickets from the Upholsterers at the plant, that is, up until about that time?
>
> A. Yes, sir, until such time as the Upholsterers Union was directed by the Upholsterers International Union in Philadelphia that we have a working agreement with the Teamsters and thereby we had to abide by it, and any and all charges that were prepared, unfair labor charges, were to be—I am searching for a word, I can't find it—were to be—
>
> Q. Until the differences were resolved?
>
> A. Right."

On February 14, 1956 (R. 175) the Furniture Workers Union held a meeting at the Labor Temple. At this meeting Truman, Kissick, and Evans were in attendance, as well as a majority of the former Craftmaster employees who were members of that union (R. 275). At one point in his testimony Truman admittedly told the membership to join Local 117 (R. 173), but at another point stated that he told them simply to apply for jobs and that if that meant signing up with the Teamsters, to go ahead and do it (R. 168-9). Kissick and Evans testified that they instructed the people to clear with or join the Teamsters only if that was necessary to return to work (R. 274, 278,

191-2). The only former Craftmaster employees who testified on the subject stated that they were definitely instructed by their union officials to become members of the Teamsters Union and that they had no intention of joining until they were so instructed. These witnesses were Mertel (R. 328-9), Bale (R. 247-9), Griffin (R. 254), and Rober (R. 267-70). It is not necessary to resolve this conflict, however, because the Board specifically pointed out that it based no finding that respondent had engaged in unfair labor practices upon what was said at the union meetings (R. 29). In any event, Truman instructed the withdrawal of the pickets on February 14 (R. 168, 175).

On the afternoon of February 13th, Williams notified Sparrowk by telephone that a majority of the potential labor force had been signed up by Local 117. Sparrowk insisted upon proof and he then went to Williams' office and counted in excess of 60 application forms (R. 310, 314). Williams later notified Sparrowk that he had an additional 20-odd applications and at about 11:00 A.M., on February 15, Sparrowk inspected G. C. Ex. 9 (R. 366-7) and found that the first page was fully completed and was reasonably certain that the second page was fully completed (R. 325-6). (It should be pointed out that 90 names are listed on the two pages in the printed record, whereas the photostatic copy in the possession of this respondent shows 87 names on the first two pages and three names on the third page. The trial examiner found the number to be "some 87" (R 35)).

Substantial production commenced at the Englander plant on February 14, when 60 employees were

hired. An additional 18 employees were hired on February 15 and 4 more on February 16, bringing the total number of non-supervisory employees to 96 (R. 30).

The collective bargaining agreement between respondent Englander and respondent Union is G. C. Ex. 2 (R. 361-365). On February 6, 1956, Sparrowk spoke on the telephone to Chester Pink, Englander's vice-president in charge of manufacturing, with offices in Chicago. Pink told Sparrowk at that time that he had in the Chicago office this document which had been signed by Dillon and Williams on behalf of the Union (R. 138, 142). Pink told Sparrowk that the document would be forwarded to him but instructed him "that when somebody had the majority that we could enter into a contract, but until every union indicated that to us, and until I was convinced that one had the majority I was to not sign" (R. 141). Following the withdrawal of the pickets and resumption of operation, on February 15 or 16, Sparrowk returned to his Oakland office and then signed the contract on behalf of respondent Englander. Up to that time there had been no signatures to the document on behalf of Englander, although its general labor counsel did sign it subsequently (R. 141, 142, 284, 365).

ARGUMENT

A. Fundamental Principles

Certain fundamental principles must be applied in this case:

First, the Board's findings of fact are conclusive only if supported by substantial evidence on the record con-

sidered as a whole. *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 95 L.ed. 456 (1951).

Second, hearsay is not substantial evidence, cannot furnish the "background" for the drawing of inferences, and will not support a finding of fact by the Board. *N.L.R.B. v. Washington Dehydrated Foods Co.,* (CA-9, 1941) 118 F.(2d) 980; *N.L.R.B. v. Haddock Engineers, Ltd.,* (CA-9, 1954) 215 F.(2d) 734; *Superior Engraving Company v. N.L.R.B.* (CA-7, 1950) 183 F.(2d) 783; *Consolidated Edison Company v. N.L.R.B.,* 305 U.S. 197, 83 L.ed. 126 (1938); *N.L.R.B. v. Amalgamated Meat Cutters* (CA-9, 1953) 202 F.(2d) 671.

Third, the Board is entitled to draw inferences from the evidence, but such inferences must be reasonable. If the Board could just as reasonably infer a proper motive as an improper one from a course of conduct, there is no substantial evidence of an unfair labor practice. *N.L.R.B. v. Houston Chronicle,* (CA-5, 1954) 211 F.(2d) 848.

Fourth, the First Amendment of the United States Constitution generally, and Section 8(c) of the Act specifically, guarantees to an employer the right of free expression of views, argument, or opinion. The employer and his agents are entitled to express a preference for one union over another, and even to encourage membership in one union rather than another, provided such expressions contain no threat of reprisal or force or promise of benefit. *N.L.R.B. v. Corning Glass Works* (CA-1, 1953) 204 F.(2d) 422, 35 A.L.R. (2d) 408; *Wayside Press, Inc., v. N.L.R.B.* (CA-9,

1953) 206 F.(2d) 862; *South Tacoma Motor Company v. N.L.R.B.* (CA-9, 1953) 207 F.(2d) 184; *N.L.R.B. v. O'Keefe* (CA-9, 1949) 178 F.(2d) 445; *Stewart-Warner Corporation* (1953) 102 N.L.R.B. 130.

Fifth, whether or not conduct is unlawful must be determined from an inspection of the whole fabric of the case. Isolated and remote statements of agents, even if attributable to their principals, will not support an unfair labor charge. *E. I. DuPont de Nemours Co.* (1953) 105 N.L.R.B. 104; *N.L.R.B. v. Armour & Co.* (CA-5) 213 F.(2d) 625; *N.L.R.B. v. Mississippi Pdcts., Inc.* (CA-5, 1954) 213 F.(2d) 670; *N.L.R.B. v. Shenandoah* (CA-10, 1944) 145 F.(2d) 542; *N.L.R.B. v. Brandeis* (CA-8, 1944) 145 F.(2d) 556; *N.L.R.B. v. Hart* (CA-4, 1951) 190 F.(2d) 964.

B. Preliminary Argument

As above mentioned, certain important allegations of the Board's complaint were found by the Board to be not supported by the evidence. The trial examiner's intermediate report and the Board order take up a total of eighty-six pages of this printed record (R. 9-79, 86-100). These documents make rather difficult reading, and some of the reasoning contained therein is even more difficult to understand. For example, at one point the examiner found that the agreement between Englander and Local 117 was in effect "as early as February 10," on the basis of testimony by Testerman that Bombardier (a Teamster representative) had told her on that date that "they had a contract" at the plant (R. 57-58). Obviously, since both respondents were charged with having entered into the contract prema-

turely and since the existence of a contract necessitated the assent of both parties, that finding must inferentially have applied to both respondents. Still, the examiner was quick to point out (R. 59) that "Needless to say . . . Bombardier's statement to Testerman . . . [is] not binding upon Englander and cannot be taken as evidence against it," for the obvious reason that it was hearsay. Later, the examiner found (R. 61) "that the agreement under consideration was entered into at some point prior to Hunt's statement on February 13." Still later (R. 88), the Board found that the contract was entered into "prior to February 14, 1956." The complaint, it will be recalled, charges that the contract was entered into "on or about January 16, 1956." In its brief (p. 18), the Board goes even further and states:

> "Thus, even before the lease was executed on January 16, the question of representation at the Seattle plant had been pre-determined by the established relationship between Englander and the Teamsters elsewhere."

The reasoning of the examiner and Board is based upon a pyramiding of inference upon inference. From the fact that the contract was entered into prematurely it is inferred that Sparrowk showed an improper preference for the Teamsters (R. 45-47). From the fact that he showed an improper preference for the Teamsters it is inferred that the contract must have been entered into prematurely (R. 60, 61, 89).

Added to all this, of course, is the fact that Sparrowk's "referring" of the job applicants on January 11 (R. 43) occurred five days before Englander was in

usiness in Seattle, and also five days before the date n which the contract is even alleged to have been exeuted (R. 5). How, then, could the contract possibly ave a bearing on the legality of Sparrowk's actions? f the Board is referring not to an executed contract ut merely to a preliminary understanding that at some uture date the parties might reach an agreement (not n the record), that can not justify enforcement of the rder, for in *Jules Resnick, Inc.* (1949), 86 N.L.R.B. 10, he Board stated:

> ". . . Furthermore, while there are indications that the respondent and the Independent may have agreed to the terms of their contract before the Independent had organized the respondent's employees, and the respondent did in fact act precipitately in signing the contract in face of A. F. of L. objections and charges, *the respondent's action did not constitute a violation of the Act, because the Independent represented a majority of the respondent's employees when the contract was executed on March 3, 1948.*" (Emphasis added)

. The Premature Contract

The Board, on pages 88-90 of this record, summarizes he "evidence" upon which it based its finding that repondents entered into the contract "prior to Februry 14, 1956." A mere recital of this "evidence" is its wn refutation. The points mentioned by the Board are iscussed below in the same order.

(a) *In 1955 and again in January, 1956, Dillon told 'parrowk that the Teamsters expect to have the Seattle peration.* This testimony could just as well have supported a conclusion that Englander was under contract

with the Furniture Workers and Upholsterers Unions, for they likewise "expected" to "have" the plant and picketed with that view in mind. Certainly, a contract contemplates the assent of at least two parties, and the expectation of one that he will at some future date secure the assent of the other if and when the other engages in business falls far short of establishing either the existence of an actual contract or an understanding that there ever will be one.

(b) *At a plant meeting on February 13, 1956, factory manager Hunt stated that Williams had the right to ask job applicants to come to the plant since the Teamsters had an agreement with Englander.* This point merits fuller discussion.

At this meeting the Furniture Workers Union was represented by Truman and Evans (R. 165, 184). Williams was there as a representative of Local 117 and likewise Sparrowk and Hunt (R. 165). The record is silent as to why Hunt was there, and it is possible that he just happened to be sitting in the office with Sparrowk at the time. At any rate, there is absolutely no evidence that he was called into the office for the purpose of meeting with the union officials. Sparrowk testified that he "substantiated the fact" that he was in the room until after the union officials left, and denies that Hunt made a statement about Williams doing the hiring for the plant (R. 302). For reasons which appear below, it is unnecessary to resolve this conflict in testimony.

Hunt had the payroll title of Factory Manager for both Craftmaster and Englander (R. 130-1). Hunt came on the Englander payroll on February 1 (R. 302), *but*

for a considerable period thereafter his duties involved the winding up of Craftmaster's affairs and he had no supervisory authority over any employees other than office personnel (R. 322). There is no evidence, nor any inference which could possibly be drawn therefrom, that Hunt's activities or responsibilities related to production or maintenance employees at the time of the February 13 meeting. Sparrowk himself did the screening and hiring up to February 14, with the exception of one casual clean-up man who had been hired by Moore through an employment agency (R. 322, 323, 336). Furthermore, there was no *apparent* authority lodged in Hunt to speak on behalf of Englander with respect to maintenance and production personnel, notwithstanding the fact that the trial examiner (R. 59) stated that: "one may assume from the fact that he has the title of factory manager that he occupies a position of substantial importance in the supervisory hierarchy at the plant." At that point, *prior to the commencement of production,* respondent submits that no one had the right to "assume" that the payroll title of factory manager carried with it any authority to speak on behalf of the employer, particularly where the evidence conclusively shows that no one was misled by the title. Evans himself testified (R. 194-5) that he looked to Sparrowk (not Hunt) as Englander's representative in this matter and that, at least at that time, he did not know what authority, if any, Hunt had with reference to labor negotiations on behalf of Englander. It should be noted that, aside from Sparrowk's denial that Hunt made the statement attributed to him, Truman was not sure whether Sparrowk was still in the room at the time (R.

172), and Evans, while not sure, thinks that Sparrowk had already left the room (R. 187-8).

Respondent moved to strike, on the ground that it was hearsay, made without authority, and accordingly not binding on Englander, the testimony concerning the alleged statement of Hunt (R. 195). The motion was denied and the testimony forms the prime basis for the Board's finding that, so far as this respondent was concerned, the contract was entered into prematurely.

Furthermore, Truman himself testified that at this meeting he was informed by Sparrowk that *Englander* was doing the hiring and *not* Williams (R. 172), although at a later point (R. 176) he was somewhat rehabilitated on re-direct examination by the general counsel to the extent that Williams' name was omitted (R. 176). What is equally important, is that up until the very time of that meeting both Sparrowk and Truman had stated to each other their mutual feelings that they might be able to do business together (R. 165, 302). It is inconceivable that Hunt's statement, if made, could in any way mislead the Furniture Workers' representatives (either as to Hunt's authority to speak or as to the existence of a commitment to the Teamsters), or that the statement could be given evidentiary value to establish the actual existence of the contract, where the top company representative on the scene and the union officials both felt that they could get along and the company representative further asserted a position concerning hiring which was utterly inconsistent with that allegedly voiced by Hunt.

Hunt's statement was not binding on this respondent

because it was made without any authority, real or apparent. *N.L.R.B. v. Brandeis* (CA-8, 1944) 145 F.(2d) 556.

Admissions of an agent are not competent unless within the scope of his authority and are statements of fact and not opinion. 31 C.J.S., Evidence, Sec. 354, p. 1128.

Even if this court should "assume," as did the Board, that Hunt had authority to speak simply by reason of his payroll title of factory manager, the statement is still not evidence because it contains conclusions and opinions rather than facts. It should be remembered that the statement was not to the effect that Hunt had *seen* a signed contract, or that he had *heard* Sparrowk and Williams agree to something. He assertedly simply concluded that the Teamsters held "an agreement" and that in his opinion certain rights arose therefrom. Courts and lawyers frequently have difficulty in determining those matters, and Hunt certainly was not qualified to express the views of an expert, particularly in the absence of any showing of the *factual* foundation therefor.

Statements or admissions relating to questions of law or consistituting legal conclusions are not admissible. A statement as to whether a contract was made or what the contract means expresses a legal conclusion. Testimony as to the opinion of a person not a witness in the case is inadmissible, particularly where such person is unqualified to express an opinion. 31 C.J.S., Evidence, sec. 272, p. 1025 *et seq.*; 32 C.J.S., Evidence, Secs. 452 and 453, p. 90, *et seq.; A. E. Staley v. N.L.R.B.* (CA-7, 1940) 117 F.(2d) 868.

Hunt's statement, *if* made, *if* within the scope of his apparent or real authority, and *if* otherwise of evidentiary value, still cannot form a foundation for a finding adverse to this respondent for the reason that it was isolated and contrary to the views expressed by Sparrowk himself to both Evans and Truman and to 75 or 80 workers assembled at the plant on January 16, all of which views were utterly inconsistent and incompatible with a prior commitment to the Teamsters.

(c) *On February 6, 1956, Sarrowk was told by Pink over the telephone that the latter had in his possession a "contract" signed by respondent union.* Respondent admits this was true, except that it denies that a document signed by only one of the parties becomes a "contract." In its then existing form, the paper constituted nothing more than an offer to contract and the evidence is uncontroverted that such offer was not accepted until Sparrowk's signature was placed thereon, on February 15 or 16.

(d) *On January 26 Sparrowk told Truman that Englander had a "master agreement" of nation-wide scope with the Teamsters and feared reprisals at the Seattle plant if he entered into a contract with another union; and on February 3 Sparrowk refused Truman's request for a consent election, ascribing the "master agreement" as the reason for such refusal.*

In the first place, Englander is not charged with refusing to bargain and Sparrowk's fear against signing with another union is not a violation in this case. Likewise, his alleged fear of reprisals will not support any charge, for he was not threatening reprisal against *Truman* but simply allegedly expressing an opinion as to

what might happen to *Englander*. Likewise, Sparrowk's alleged refusal to consent to an election is not charged, nor could it be, as a violation. The crux of this point is the "master agreement."

Sparrowk's purported statements to Truman concerning the "master agreement," were taken by the Board (R. 60, 61, 89, 90) as evidence that such a nationwide agreement actually existed. The Board also took the statement (R. 38) as evidence of an improper motive on Sparrowk's part in referring the applicants to the Teamsters. If in truth and in fact such a nationwide "master agreement" did not exist, then even if Sparrowk had made such a statement it should not justify the conclusion reached by the Board. The mere making of the statement might have a bearing on Sparrowk's motivation for making the "referrals" (if such motivation is a material factor), but that subject will be discussed below.

At the outset, it should be mentioned that the general counsel conceded that this was not a "master agreement," but rather a "pattern form" (R. 140). The Board was unable to find, despite some testimony to the contrary, that any of the 75 to 80 employees assembled at the plant on January 16 were told by Sparrowk when he addressed them, that there was a "master agreement" binding Englander to the Teamsters with respect to the Seattle plant. Rather, the Board found (R. 42) that he told the people simply that the Teamsters had informed him "that they would have this plan (in Seattle) inasmuch as they have Englander factories elsewhere in the country . . . " The Board specifically

found, in other words, that Sparrowk was simply repeating a prediction by the Teamsters that they would be successful in getting representation rights. It will be remembered that in Paragraph VI of the Complaint (R. 6) Englander is charged with having told the workers of the "national agreement" as early as January 11, 1956. There is no finding that he did so then, nor on January 16, nor at any other time, nor has any such agreement been produced in evidence, orally or in writing. If, however, such an agreement did exist or if Truman had been led by Sparrowk to believe it to exist, that would be utterly inconsistent with testimony of the representatives of the Furniture Workers and Upholsterers Union themselves.

Ralph Royer, the Upholsterers' Business Agent, testified that he met with Williams on the afternoon of February 13, and had read to him "a contract that they have up and down the Coast and to other plants, he read that to the members." This "contract" was not signed, but was simply a contract form (R. 205-6). Truman himself testified that on Jan. 26 (R. 179) Sparrowk had assured him that if the Furniture Workers Union represented the people who worked in the millroom he would recommend to his superiors that such union be recognized. Kissick testified (R. 277-280) that at least until Feb. 6 the question of representation was a wide-open matter. Truman stated on Feb. 13 that he felt up to that date that it looked like Englander and the Furniture Workers were going to be able to do business together (R. 302). What is most significant is the following testimony of Truman (R. 170):

"Q. Now, Mr. Truman, there was reference made to a Warehousemen or Teamster agreement or agreements. Now, which was it, plural or singular, if you recall?

A. As I recall, it was both . . .

Q. But you would not dispute it if Mr. Englander would tell you that there were several covering the several plants?

A. I would neither refute it nor admit it, sir, because I can't remember."

Truman and the other union officials concerned, as well as their union members, were led to believe and did actually believe that Englander was not bound to the Teamsters under a single nation-wide agreement, but instead, had "agreements" with the Teamsters at some of the Englander plants. The Board did not consider this evidence in its whole context, but seized upon isolated portions in order to arrive at its adverse findings.

(e) *On February 10, 1956, Bombardier told Testerman that "they had a contract at the plant."* This testimony was objected to by respondent on the ground that it was hearsay and not made in Englander's presence. The examiner ruled: "Well, I will take it as to the union" (R. 226-7). In his intermediate report the trial examiner ruled that the testimony could not be used against this respondent (R. 59). Being hearsay, the testimony may not be considered, at least as far as this respondent is concerned.

(f) *The document signed around Feb. 13, 1956* (GC Ex. 9, 366, 367), *indicates that the applicants therein accept "all working conditions contained in the contract in effect between the International Brotherhood*

of Teamsters and the Englander Company . . . " This, of course, is likewise hearsay as to Englander, since it was prepared and signed by persons other than its representatives. The trial examiner likewise observed (R. 59) that the document was not binding against this respondent.

(g) *The absence of any evidence of prior negotiations, together with the fact that the contract is little more than a duplicate of the Los Angeles contract.* Respondent concedes that there is little or no evidence in the record as to the negotiations leading up to this contract. It is true that Sparrowk did not know about any negotiations, but if that is a critical fact, was not the burden on the Board to produce evidence that none took place? The other signators were just as available to the Board as witnesses as to the respondents. Considering that the agreement as proposed by the Teamsters was first submitted to Chicago after being signed by Dillon and Williams, persons other than Sparrowk could possibly have shed some light on this subject had the Board deemed it of any consequence.

Furthermore, the evidence shows that except for matters pertaining to pension payments (whether by the week or by the hour), the absence of a wage schedule, and a provision for observance of Washington's birthday (a legal holiday in the State of Washington, RCW 1.16.050), the Seattle contract was patterned after the Los Angeles contract (R. 307-309). With regard to wages, Sparrowk had assured the applicants that they would be paid much the same as in the past while working for Craftmaster (R. 350). The contract is admit-

ed by the general counsel to be a "pattern form" (R. 140). Sparrowk himself was present at some negotiations leading up to the Los Angeles contract (R. 306), and therefore it was only necessary for him to verify that it followed the same pattern except for the parts that were written in (R. 308). In any event, Sparrowk's big problem at that time was not necessarily the terms of a contract, but rather whether it should be signed with the Teamsters or with the Upholsterers and Woodworkers. This was a jurisdictional dispute. It took better than a month for this controversy to be resolved and he signed with the former union when he was satisfied that it had the majority. It is not an uncommon practice for parties who have had prior dealings together to utilize legal forms which are familiar to them. Lawyers frequently borrow forms from other lawyers and adapt them to a given situation. Why, then, should the Board draw an improper inference from this action on the part of respondent when a lawful and proper inference could more reasonably be drawn? Added to this is the fact that the Furniture Workers Union and the Upholsterers Union, in their prior dealings with Craftmaster, had themselves furnished the pattern for the wage schedule. In any event, does the absence of evidence as to the extent of prior negotiations justify the Board in concluding that the agreement must have been executed on January 16, or February 10 or February 13?

No contract, oral or written, was entered into between Englander and the Teamsters at any time prior to February 15, and the Board's findings to the contrary must be set aside.

D. Sparrowk's "Referrals" to the Teamsters

The "impact" of Sparrowk's conduct upon the job applicants is discussed by the trial examiner on page 49 of the record and by the Board on pages 13 and 14 of its brief. The trial examiner mentioned that "various job applicants did not take Sparrowk's advice, but instead reported it to their own unions." That is quite an under-statement. *The fact of the matter is that out of 126 former Craftmaster employees the record discloses only two who joined Local 117 prior to being instructed to do so by the Furniture Workers or Upholsterers Union.* One of these persons was Walters. He could not pos sibly have been misled into believing that Englander was bound to the Teamsters, for at the Teamsters Hall, Williams explained to him the Teamster pension plan that they *hoped* to get from Englander (R. 342). The other person was Harstad, *and he joined the Teamsters while still on the Craftmaster payroll* (R. 359-360). Other employees testified flatly that they neither joined nor intended to join the Teamsters until told to do so by their own unions. These employees were Mertel (R. 328), Griffin (R. 252), Bale (R. 248-9), and Rober (R. 268-9). The "impact" of Englander's allegedly unlawful conduct was slight indeed.

Sparrowk's "referrals" were hardly made "gratuitously." A jurisdictional battle was shaping up. The plant was shut down and former Craftmaster employees came to him and asked what they were to do (R. 293). Some had been sent to the plant by their own union officials (R. 351). Some were contacted by Moore and some came in without any prior contact (R. 339). On

an. 11 Sparrowk talked to 15 or 20 people. Apparent-
y all asked the same questions, for he decided he
should have a phonograph record made" (R. 122).
ome of them asked him where Williams' office was and
e furnished the address after getting a telephone book
R. 295). While, as observed by the trial examiner (R.
4-5), one of the interviewees did not himself ask for
he address, Sparrowk was definitely asked for the ad-
ress after the first few interviews (R. 295). Bale spe-
ifically requested that Sparrowk give him the address
n writing (R. 246).

The trial examiner makes much of Sparrowk's real motivation" and "purpose" in suggesting that the job pplicants see Williams. If a subjective test is to be ap-lied, was it not reasonable and proper for Sparrowk o make those suggestions, in view of demands or "ex-ectations" by the Teamsters for recognition which he new were going to conflict with the demands of the ther unions? The Board's argument on this point, ommencing on page 13 of its brief, is devoted very ttle to what Sparrowk actually said, but very exten-ively to why he said it. Respondent contends that Spar-owk's motivation was most legitimate, considering hat he was simply trying to resolve a jurisdictional dis-ute so that he could get the plant in operation, and oward that end simply told the applicants who one of he disputants was so that they could investigate for hemselves. Regardless of that, respondent maintains hat his "referrals" or "invitations" did not constitute nlawful conduct and that much stronger assertions ave been held by this court and others to be within the

protection of the First Amendment and Section 8(c) of the Act.

In *N.L.R.B. v. Corning Glass Works* (C.A.-1, 1953) 204 F.(2d) 422, 35 A.L.R.(2d) 408, a far stronger case of violation was presented against the employer, but enforcement of the Board's order was denied. The question there involved was the Board's alleged preference of an A.F. of L. Union over a C.I.O. Union. The court stated:

> " . . . Several rank-and-file workers, both men and women, with their supervisors' permission, left their machines to substitutes selected by their supervisors and circulated freely and openly throughout the plant on the respondent's time distributing AFL cards and soliciting membership in that Union from other workers both while the latter were at the machines, as well as during the rest periods. And two or three of the respondent's supervisors verbally encouraged the solicitors in their work, inquired as to the progress of the campaign, and expressed satisfaction with the results being achieved, voicing preference for AFL over CIO, not only to the solicitors but also to other workers in the plant, saying in substance that it would be 'advisable' to sign AFL cards, and that they did not want CIO in the plant."

The court then went on to hold:

> "The Board's position is not altogether clear. First it said that 'strict neutrality' is the rule for an employer to follow when rival unions are attempting to organize its employees. Then it backs away from its broad generalization by conceding that under some circumstances an employer may express a preference, but follows this by a finding

that the respondent through some of its supervisors, had overstepped the bounds and committed an unfair labor practice by indulging in 'action to aid' AFL, which it apparently considered a violation of Section 8(a)(2), and by exerting 'verbal pressure' on its employees, which it obviously considered a violation of Section 8(a)(1).

" . . . But to constitute such support, we think there would have to be some non-privileged discrimination against the second union, and there is no evidence of that in this case."

It is important to note that there is no evidence of an anti-union background on the part of the employer in this case, and no evidence that the Upholsterers and Furniture Workers Unions were not afforded equal opportunity with the Teamsters to organize the job applicants. *N.L.R.B. v. Corning Glass Works, supra.*

In *Wayside Press, Inc., v. N.L.R.B.* (C.A.-9, 1953) 206 F.(2d) 862, the employer petitioned to set aside the Board order based upon a charge that it was favoring the Independent union over the Pressmen's Local No. 78. A part-time foreman, Stevens, was asked by an employee for his opinion on the advisability of reactivating the Independent. Stevens replied that "it would be a litle bit in our favor if we did have it that way." There was other evidence of alleged assistance to the Independent by Stevens and other foremen, who were assumed by the court to be "supervisory employees," for the purpose of the decision. In denying enforcement, the court held:

" . . . In any event, it is no violation of the Act that the employees knew that the employer pre-

ferred an independent union or that Foreman Stevens preferred to be a member of it . . .

"We think that the evidence adduced failed to support the Board's findings. There is no showing of any record of hostility toward the outside union . . . or of active solicitation by supervisors, or some other pointed indication of the employer's anti-union sentiment, such as can be found in other cases where disestablishment orders which are based upon acts of supervisory officials have been enforced . . .

" . . . Wayside is a small plant, employing some sixty persons. To attempt, as the Board has done, to amply the same standards to such a plan as are applied to plants employing hundreds of persons with full-time supervisory employees is to ignore reality."

In *South Tacoma Motor Company v. N.L.R.B.* (CA-9, 1953) 207 F.(2d) 184, there was a petition by the employer to set aside an order based on violations of Section 8(a)(1) and 8(a)(3). The employer was under contract with the Retail Clerks, and was charged, among other things, with favoring that union over the Teamsters, and that it discharged a salesman who was thought to favor the Teamsters. The court denied enforcement:

"There is no evidence of anti-union background in petitioner's history. The circumstances that management praised the terms of the present contract and that it favored Retail Clerks over Teamsters is not a violation of the statute . . . ; 'acquiescence' or 'approval' are not what the Act contemplates when it uses strong words such as 'in-

terfere,' 'restrain,' 'coerce,' and 'dominate' in Section 8(a)(1) and (2)."

In *N.L.R.B. v. O'Keefe* (CA-9, 1949) 178 F.(2d) 445, he president of the employer corporation had frankly tated that management preferred no union at all, but preferred the A.F.L. to the C.I.O., as the lesser of two evils. The Board found that his speeches *per se* were violations. To support this conclusion the Board cited a number of cases decided under the National Labor Relations Act prior to modification by the Labor Management Relations Act of 1947, 29 U.S.C.A., Sections 141-197. The president of the corporation had said that he felt all unions were evils; that the "question for you to decide is which of the two . . . evils is the lesser." He expressed a preference for the A.F. of L. over the C.I.O. The court stated:

> " . . . But we do not find in anything he said any coercion or threat of reprisal. Neither did the employees, for in spite of the president's speech, the C.I.O. won the election by a substantial majority. . . . We realize that words are not to be looked at in a vacuum, but in the light of all the circumstances surrounding their utterance. Even so, we do not find in the words used here anything which can be construed as coercive. That being so, it is our responsibility to say, as we do, that the finding of coercion through the speeches is not based upon substantial evidence. Therefore, enforcement of that portion of the order enjoining violation of which there is no substantial evidence will be refused."

The determination of whether language used by an employer is unlawful is a question of law ascertain-

able from a consideration of the language itself. *N.L.R.B. v. Brandeis* (CA-8, 1944) 145 F.(2d) 556. An employer's statement cannot be used as background material for the finding of an unfair labor practice where such statement falls short of restraint or coercion. Hasty recognition of one of two rival unions is not background evidence of unlawful assistance. *Coppus Eng. Corp. v. N.L.R.B.* (CA-1, 1957) 240 F.(2d) 564.

E. Griffin and McDonald

It will be recalled that in Paragraph VI of the Complaint (R. 6) Sparrowk and his subordinates were charged with having told job applicants of the "national agreement" containing a union security clause; and also having instructed *"each applicant"* to "go to the offices of Respondent Teamsters to comply with such conditions precedent to hire which said Respondent Teamsters imposed." The last portion of that charge has apparently been abandoned entirely, for there is no evidence or finding that Englander or any of its representatives told any employee to comply with Teamster instructions. The first portion of the charge has apparently been abandoned as to Sparrowk, for he was found not to have made such statement to any employee. This brings up the question of whether his subordinates acted improperly and leads to a discussion of the cases of Griffin and McDonald.

The Board found (R. 52) that certain statements made by Sparrowk's subordinates to these two people constituted coercion, unlawful support and discrimina-

tion in violation of the first three subdivisions of Sec. 8(a).

Adverse findings with respect to Griffin and McDonald were made on the basis of their own unsupported testimony. Moore denied that he made the statements attributed to him (R. 337). Sparrowk did *not* instruct him to impose any conditions of union membership in his dealings with the workers, but simply told him that Englander had been approached by the Teamsters relative to their membership (R. 338). The trial examiner resolved the conflict in testimony against this respondent for two reasons: First, because Griffin and McDonald gave "circumstantially detailed accounts" of their discussions, while Moore's denial was a "blanket" one; second, because the premature execution of the contract lends plausibility to their testimony (R. 50-52). This type of circuituous reasoning pervades the examiner's report and Board order: Because the contract was entered into prematurely, Englander was predisposed toward the Teamsters; because Englander was predisposed toward the Teamsters, the contract must have been entered into prematurely (R. 59-61).

Respondent will not ask this court to resolve substantial conflicts in the testimony, but does submit that it was improper to draw adverse inferences in such a case simply because two out of 126 possible job applicants gave "detailed accounts" of their conversations with Moore, and Moore's denial was general in nature. Indeed, Moore's testimony would truly have been suspect had he undertaken to give detailed accounts of the many conversations he had with 126 possible job applicants lasting over a period of one month.

Mrs. Griffin could not possibly have been misled or coerced by what Moore told her, for he made it very clear that the jurisdictional dispute was still unresolved. By her own testimony Moore told her in that very same conversation: "Well, it isn't settled yet one way or the other" (R. 252). Her further testimony is as follows:

> "Q. (By Mr. Margolis): Mrs. Griffin, during your conversation with Bill Moore on Feb. 13 [14] he gave you to understand that there had been and was still in existence some controversy between Local 3197 and Local 117, correct?
>
> A. Yes.
>
> Q. The controversy involving which union would have jurisdiction over the people in the plant, correct?
>
> A. Yes.
>
> Q. And he told you at that time that the controversy had not been settled yet, one way or the other?
>
> A. That is right.
>
> Q. And you decided to become a member of Local 117, not until you spoke to Mr. Kissick, which was after you spoke to Mr. Moore, is that correct?
>
> A. That is right."

McDonald submitted his application for employment on February 20. On the evening of February 21, Red Henry, head shipping clerk, telephoned him and told him a job was available, and according to McDonald, he would have to "clear through the Teamsters." McDonald decided to think it over and on the following Thursday, February 23, at 4:45 P.M., he came to the plant and spoke to Moore. According to McDonald he was

informed that he had to join the Teamsters and asked "why should you be the only one not to join the Teamsters when everybody else has?" McDonald stated that he refused to join (R. 255-258). McDonald, like virtually all of the others, had previously been employed with Craftmaster (R. 255), but had had interim employment elsewhere.

It will be remembered that the McDonald incident occurred *after* the contract containing the Union Shop clause had admittedly been executed. There is no testimony as to *when* McDonald would have to "clear through" or "join" the Teamsters. The conversations could have just as reasonably referred to the perfectly legitimate requirement in the contract of joining 31 days after the commencement of employment. Instead, the Board read into the testimony the inference that Moore, in effect, was attempting to impose a closed shop requirement in the case of McDonald.

In any event, notwithstanding the charge (R. 6) that Englander instructed each applicant to go to the offices of the Teamsters and comply with certain conditions precedent to hire, we find a situation where two out of a possible 126 persons were assertedly so instructed by Englander and through Moore and not Sparrowk. These incidents, if they occurred as the Board found they did, were isolated, casual and remote, and could not possibly have had a substantial effect on the over-all situation. It should still be borne in mind that only the Griffin incident occurred prior to the execution of the contract. Is it unlawful interference, coercion, assistance or discrimination where the improper conduct which the Board says was applied to help the Team-

sters and hurt the other unions was applied in the case of less than 1% of the job applicants? An employer can be meticulously fair in top management dealing with employees, and if in an isolated one or two cases, arising through subordinates, some improper conduct might be inferred, the tail should not be permitted to wag the dog.

Isolated statements of supervisors, contrary to the policy of the employer and neither authorized, encouraged or acquiesced in by him, do not support a charge that the Act has been violated. *N.L.R.B. v. Hart* (CA-4, 1951) 190 F.(2d) 964, and cases above cited.

Respondent urges that in any event the McDonald incident cannot affect the outcome of this case, except from the possible standpoint of his reinstatement with back pay. The reason for this is that by the clear language of Section 8(a)(3) (see Appendix), unlawful assistance rendered *after* the execution of a union shop contract does not invalidate the contract. Respondent maintains, however, that the fragmentary nature of the evidence pertaining to McDonald and the isolated nature of the incident should prevent the enforcement of the Board order as to him as well. The Board begs the very question under consideration when it points out in its brief (pages 17, 24, 25) that a union security clause with an assisted union is in itself unlawful, since there was no such assistance.

CONCLUSION

Considering the time and effort expended by the Board in the presentation of this case and the specific charges in the Complaint as to the date on which the premature contract was executed and as to the nature of the unlawful action otherwise taken by Sparrowk and his subordinates, along with the fact that the matters in controversy were not discussed in secret but in the presence of up to 126 workers, one could reasonably anticipate that if such charges were well-founded there would be some direct evidence of a substantial nature to support them. Still, all that emerges from the record is a series of inferences heaped upon inferences drawn by the Board as to when the agreement might have been entered into (on or about January 16, before February 10, before February 14, etc.) despite direct undisputed evidence that the execution date was February 15 or 16. To this should be added that the improper "motivation" ascribed to Sparrowk's actions and the Board's own findings as to what he actually did or said fail to show the type of conduct prohibited by the Act. The isolated occurrences involving two members of the subordinate supervisory staff fall far short of supporting the charges in the whole context.

Decree should be entered denying enforcement and, on this respondent's petition for review, setting aside the Board order in its entirety.

Respectfully submitted,

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APPENDIX

The National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Sections 141, *et seq.*) reads, in part, as follows:

UNFAIR LABOR PRACTICES

Sec. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made . . .

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(c) The expressing of any views, argument, or opin-

ion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

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PEVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 . . .

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.